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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/017,474	12/14/2001	S. Scott Friderich	KCC-16,182	5217
35844	7590	03/22/2006	EXAMINER	
PAULEY PETERSEN & ERICKSON			REICHLE, KARIN M	
2800 WEST HIGGINS ROAD			ART UNIT	
HOFFMAN ESTATES, IL 60195			PAPER NUMBER	

3761

DATE MAILED: 03/22/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

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<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/017,474	FRIDERICH ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Karin M. Reichle	3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 05 November 2004.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-29 is/are pending in the application.
- 4a) Of the above claim(s) 1-14, 16, 18, 21, 23 and 25-27 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 15, 17, 19, 20, 22, 24 and 28-29 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 05 November 2004 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>9/7/04</u> . | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### *Election/Restrictions*

1. Claims 1-14, 16, 18, 21, 23, and 25-27 are still withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in Paper No. 8.

### *Specification*

#### *Drawings*

2. The drawings were received on 11-5-04. These drawings are approved. However see following paragraph.

3. The drawings are objected to because in Figure 7, the line from the upper 48 should also be dashed to denote underlying structure. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either

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“Replacement Sheet” or “New Sheet” pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

### ***Claim Objections***

3a. Claims 15, 17, 19-20, 22, 24, and 28-29 are objected to because of the following informalities: in claim 15, line 9, should “being” be --which is--? This also applies to similar language in claims 28-29. Appropriate correction is required.

### ***Claim Language Interpretation***

4. The claim terminology “article”, “attached”, “bicomponent”, “bonded”, “elastomeric”, “extensible”, “containment flap”, “longitudinal”, “transverse”, “CD”, “necked” “material”, “substantially continuous fibers” are defined as set forth on pages 7-14.

### ***Claim Rejections - 35 USC § 102***

5. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

6. Claims 15, 17, 19-20 and 28-29 are rejected under 35 U.S.C. 102(b) as being anticipated by Roe et al ‘866.

Claims 15, 20 and 29: See Figure 1 and Figure 18, the article is 20, the chassis is 22, the flap is 30 or 1830 and includes elastomerics 54 for tensioning the flap in the longitudinal direction and the flap, i.e. panel 31 or 1831, is extensible in the transverse direction, see, e.g.,

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col. 6, lines 1-20, col. 9, line 55-col. 10, line 32 (and thereby also Freeland et al '120 at col. 14, lines 27-49, col. 15, lines 62-col. 16, line 25), col. 30, line 31-col. 31, line 2. It is noted that the terminology "low modulus of elasticity" has not been given a specific definition and thereby is considered relative. The Roe et al device is considered to have a "low modulus of elasticity". Claim 15 now recites the function, capability or properties of the structure claimed in the claim on lines 8 et seq thereof. Claims 28 and 29 recite similar functions, capabilities or properties. See the cited portions supra especially col. 30, lines 31-47. Therefore it is the Examiner's first position that the Roe et al reference teaches such function, property or capability of the structure. In any case, the Examiner's second position, at the very least Roe et al teaches all the claimed structure. Therefore, there is sufficient factual evidence for one to conclude that such same structure would also inherently include the same claimed function, property or capability, see MPEP 2112.01.

Claim 17: see col. 6, lines 1-20, col. 9, lines 41-43, col. 24, line 10-59 (Note also definition of nonwoven and spunbonded nonwoven in Materials Handbook, 13<sup>th</sup> edition).

Claim 19: see definition of "bonded" in the Claim Language Interpretation section supra. It is noted that the claim does not require "separate bonding" as argued by Applicant. Roe et al teaches both separate bonding and monolithic attachment, see again col. 6, lines 1-5.

7. Claims 15, 17, 19-20, 22 and 28-29 are rejected under 35 U.S.C. 102(b) as being anticipated by Serbiak et al '232.

Claims 15, 20, 22 and 28-29: See Figure 1, col. 2, lines 17-41, col. 4, lines 50-65, col. 6, lines 4-10, col. 6, line 44-col. 7, line 10 et seq (and thereby Morman '992 at col. 5, line 57-col. 6, line 21), col. 8, lines 31-41 and col. 12, lines 24-30, i.e. the article is 8, the chassis is 22, 24, and

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26 where coextensive, the flap is adjacent 40 and includes elastomeric 40 for tensioning the flap in the longitudinal direction 18 and the flap is extensible in the transverse direction 20. It is noted that the terminology “low modulus of elasticity” has not been given a specific definition and thereby is considered relative. The Serbiak et al device is considered to have a “low modulus of elasticity”. Claim 15 now recites the function, capability or properties of the structure claimed in the claim on lines 8 et seq thereof. Claims 28 and 29 recite similar functions, capabilities or properties. See the cited portions supra. Therefore, at the very least Serbiak teaches all the claimed structure. Therefore, there is sufficient factual evidence for one to conclude that such same structure would also inherently include the same claimed function, property or capability, see MPEP 2112.01.

Claim 17: see portions cited supra (Note also definition of nonwoven and spunbonded nonwoven in Materials Handbook, 13<sup>th</sup> edition).

Claim 19: see definition of “bonded” in the Claim Language Interpretation section supra. It is noted that the claim does not require “separate bonding” as argued by Applicant. It is the Examiner’s first position that Serbiak teaches attachment or bonding of an attached edge to the chassis as claimed, e.g. monolithic attachment. Note also rejection infra.

### ***Claim Rejections - 35 USC § 103***

8. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

9. Claims 15, 17, 19-20, 22 and 28-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Serbiak et al ‘232 in view of Roe et al. ‘866.

See discussion in paragraph 7 supra with regard to claim 19. Serbiak at the very least teaches monolithically attaching or bonding the edge of the flap to the chassis as discussed supra. However, even if the claim would be interpreted to preclude monolithic attachment or bonding of the edge to the chassis, see again col. 6, lines 1-5 of Roe et al. Therefore, to make the flaps which are extensions or monolithically formed of Serbiak flaps which are separate members joined to the chassis instead would be obvious in view of the interchangeability as taught by Roe. In so doing, the prior art device would include all the claimed structure and include or necessarily and inevitably include all the claimed function, property and function thereof.

10. Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over Serbiak et al, alone, or in view of Roe et al '866, as applied to claim 15 above, and further in view of Morman et al '045.

Applicants claim a flap comprised of necked spunbond material having a necked spunbond nonwoven material of substantially continuous bicomponent fibers being necked to about 45% of its original width, with a basis weight of about 0.4 osy, a Young's modulus in the CD of about 3 psi/% and a hydrohead of less than about 4 mbar. The Serbiak et al reference teaches a flap comprised of necked spunbond material, i.e. the topsheet, having a necked spunbond nonwoven material of substantially continuous fibers being necked to about 45% of its original width, with a basis weight of about 0.4 osy, extensibility in the cross direction and liquid permeability, see portions cited supra. Therefore, Serbiak et al includes all the claimed structure except for bicomponent fibers and the specific modulus and hydrohead. However, see Morman '045, at col. 9, line 32-col. 10, line 20, i.e. interchangeability of polyolefin fibers and bicomponent fibers to make neckable material. To make the necked polyolefin spunbond

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nonwoven material of Serbiak et al necked bicomponent spunbond nonwoven material instead would be obvious to one of ordinary skill in the art in view of the interchangeability as taught by Morman et al. Furthermore, the general conditions of the nonwoven material are disclosed by Serbiak et al, i.e. the topsheet material defining the flap includes extensibility in the cross direction and liquid permeability. Therefore to discover the optimum or workable extensibility in the cross direction and liquid permeability of such material for the flap of Serbiak et al, i.e. about 3 psi/% and 4 mbar, if the material does not already include such when tested according to the tests of the instant application, is not inventive, In re Aller et al, 105 USPQ 233. It is noted that the criticality of 3 psi/% or 4 mbar with respect to other extensibilities in the cross direction and liquid permeabilities of the material has not been set forth.

### ***Double Patenting***

11. Applicant is advised that should claim 15 be found allowable, claims 19, 28 and 29 will be objected to under 37 CFR 1.75 as being a substantial duplicate thereof. When two claims in an application are duplicates or else are so close in content that they both cover the same thing, despite a slight difference in wording, it is proper after allowing one claim to object to the other as being a substantial duplicate of the allowed claim. See MPEP § 706.03(k).

Claim 28 is the same as claim 15. Claim 29 is the same as claim 15 except for section c) and the lack of the “thereby” clause. However since claim 15 requires the flap having the attached edge being attached to the chassis and “bonded” as defined by Applicant does not appear to define anything more than such an attachment, see page 8, lines 7-10 of the instant application, and the capability of the thereby clause is inherent in the structure claimed in claim



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15, claim 29 is considered to be a substantial duplicate thereof. With regard to claim 19, see discussion of claim 29, section c) supra.

12. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

13. Claims 15, 17, 19-20 and 28-29 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 9-10, 14-19 and 21-25 of copending Application No. 10/024,634. Although the conflicting claims are not identical, they are not patentably distinct from each other because since both applications have the same effective filing date of 12-21-2000, the one way *In re Vogel* test applies, i.e. are the claims of the instant application obvious in view of the claims of the '634 application? The answer is yes. The claims of the instant application are broader than the claims of the '634 application, i.e. don't require the flap to be a breathable liquid impervious barrier material or the specifics of claims 10, 15, 17-19 and 21-24. It is noted that spunbonded material includes continuous fibers (see again Materials Handbook set forth supra) and note the definition of "article" on page 7 of the instant application. In essence, once the applicant has received a patent for a species or more specific embodiment, the applicant is not entitled to a patent for the generic

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or broader invention. This is because the more specific “anticipates” the broader. Applicants attention is again invited to *In re Goodman*, supra.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### *Response to Arguments*

14. Applicants remarks with regard to matters of form on pages 11-12 have been considered but are either deemed moot in that the issues have not been reraised or are deemed not persuasive for the reasons set forth supra. Applicants remarks on page 7, first three full paragraphs with regard to *Roe* have been considered but are deemed narrower than the teachings of *Roe*, e.g. note the cited portions set forth in the prior art rejection supra, especially col. 30, line 31-col. 31, line 2, especially col. 30, lines 35-47. With regard to the remainder of the arguments with respect to *Serbiak*, it is noted that the leg cuff are of *Serbiak* are not merely traditional cuff arrangements. Like the disclosed instant invention, the cuffs of *Serbiak* are both longitudinally and transversely expandable due to necked spunbond material of substantially continuous fibers necked to about 45% of its original width, with a basis weight of about 0.4 osy, and liquid permeability. With regard to the arguments with respect to claim 19, see the discussion of claim 19 supra. It is again noted that while Applicant argues the recitation of “separate bonding” in claim 19, only “bonding” is claimed. Applicant’s lack of argument with respect to the double patenting rejections have been noted. Applicant’s request for an interview is noted. However in light of the new grounds of rejection and other new issues, such request is held in abeyance until review of this action by the Applicant. Furthermore, in order more readily identify such a

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request in a timely manner, Applicant is requested to personally contact the Examiner with any further requests for an interview.

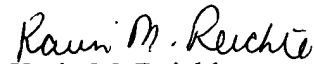
*Conclusion*

15. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The Faulks reference is cited because it teaches separately bonding flaps of stretchability in two directions of a neck bonded laminate.

16. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Karin M. Reichle whose telephone number is (571) 272-4936. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tanya Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Karin M. Reichle  
Primary Examiner  
Art Unit 3761

KMR  
March 13, 2006